

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Statement of the Case	2
Reasons for Denying the Writ	4
A. "Reasonableness" and "Good Faith" Are Im- plicit Requirements of Rule 68	5
B. The Court of Appeals' Interpretation of Rule 68 is Consistent With the Objectives of Title VII	7
Conclusion	8

TABLE OF AUTHORITIES

Cases

<i>Christianburg Garment Co. v. Equal Employment Op- portunity Commission</i> , 434 U.S. 412 (1978)	7
<i>Dual v. Cleland</i> , 79 F.R.D. 696 (D.D.C. 1978)	4, 5
<i>Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.</i> , 63 F.R.D. 607 (E.D. N.Y. 1974)	4, 5
<i>Staffend v. Lake Central Airlines, Inc.</i> , 47 F.R.D. 218 (N.D. Ohio 1969)	5

Statutes and Rules

42 U.S.C. §2000e <i>et seq.</i>	2, 4, 7
Fed. R. Civ. P. 1	4
Fed. R. Civ. P. 54(d)	6
Fed. R. Civ. P. 68	2, 3, 4, 5, 6, 7
United States Supreme Court Rule 19	7

Miscellaneous

	PAGE
Sol. R. Civ. P. 68, Advisory Committee Note on 1946 Amendment, 28 U.S.C.A. (West 1970)	6
Moore's Federal Practice §68.02 (2d ed. 1972)	6

**In the
Supreme Court of the United States**

OCTOBER TERM, 1979

No. 79-814

DELTA AIR LINES, INC.,

Petitioner,

vs.

ROSEMARY AUGUST,

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT**

The respondent, Rosemary August, respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals, affirming the unreported decision of the District Court, and the

unreported decision itself are reproduced in the appendix to the petition.*

STATEMENT OF THE CASE

This action was brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* by the respondent, Rosemary August, against the petitioner, Delta Airlines, Inc., on January 4, 1977, after the receipt by Respondent of a right to sue letter from the Equal Employment Opportunity Commission. The respondent, alleging, *inter alia*, that she was discharged from her position as a flight attendant because she was black, sought back pay, benefits, reinstatement, other injunctive relief, and attorneys' fees and costs in accordance with the provisions of 42 U.S.C. §2000e-5.

More than four months after Respondent filed suit, Petitioner tendered an offer of judgment to Respondent pursuant to Rule 68 of the Federal Rules of Civil Procedure ("Federal Rules"). (App. G, A 36). By its offer, the petitioner proposed "to allow judgment to be taken against it . . . in the amount of \$450.00 [including] attorney's fees, together with costs accrued to date." (App. F, A 33-34). Respondent did not accept the offer.

A five-week bench trial ensued, at the close of which the district court entered judgment for the Petitioner. (App. E, A 19-32). The trial judge found that although the record did reveal some evidence of disparate treatment (App. E, A 29), the preponderance of the evidence did not indicate the difference of treatment was the result of racial discrimination. (App. E, A 28). Each party was ordered to bear its own costs. (App. E, A 32).

* Reference to those opinions as well as to Rule 68 of the Federal Rules of Civil Procedure will be made to the petition as "App. ----, A ----."

Following entry of judgment for the Petitioner by the trial court, the Petitioner filed a motion for costs. The district court denied the motion, holding that the petitioner's offer of \$450.00 was not "arguably reasonable" in view of the size and merit of Respondent's claim. (App. C, A 11-12).

Respondent appealed on the merits and the petitioner cross-appealed on the basis of the denial of costs. The Court of Appeals affirmed the judgment for the petitioner on the merits, noting that Petitioner had "offered some proof which suggested that she may have been subject to discrimination" (App. D, A 16), and that it "... [did] not view [the] case as frivolous." (App. D, A 18).

The Seventh Circuit affirmed the denial of Petitioner's Rule 68 motion. (App. B, A 2-7).

In the order issued August 28, 1979, the Court of Appeals denied Petitioner's Petition for Rehearing and Suggestion for Rehearing en Banc. (App. A, A 1).

REASONS FOR DENYING THE WRIT

This suit, was initiated pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §20006 *et seq.* The Court of Appeals, affirming *per curiam* the District Court decision, properly rejected an interpretation of Rule 68 as technical as not to encompass the basic underlying elements of reasonableness and good faith. (App. B, A 27)

The notion that a federal rule is based on such a foundation is neither new nor unusual; rather, it is in keeping with the mandate of Rule 1 of the Federal Rules to construe the Rules "to secure the just . . . determination of every action." Toward this end, and in recognition of the national policy underlying Title VII, the Court of Appeals approved the exercise of discretion under Rule 68 in a Title VII case. The Seventh Circuit held that costs might be allowed in such a case when a trial judge could determine that a Rule 68 offer " . . . had been made in good faith and . . . had some reasonable relationship in amount to the issues, litigation, risks and expenses anticipated and involved in the case." (App. B, A 7)

The issues the Petition seeks to raise involve no conflict among the circuits.

The Petition cites two district court cases, *Dual v. Chelmsford*, 39 F.R.D. 696 (D.D.C. 1978), and *Mr. Hanger, Inc. v. Carl Noll Plastic Hangers, Inc.*, 63 F.R.D. 607 (N.D.N.Y. 1974), in support of the proposition that once the technical requirements of Rule 68 have been met, the cost shifting provisions of the rule should operate automatically. (Pet. at 12-13). It is the respondent's position that both of these decisions are in harmony with the decision of the Court of Appeals in this case.

In *Dual*, a Title VII case, the trial court found for the defendant. Although that court held that the defendant was automatically entitled to costs under Rule 68, the elements of good faith and reasonableness were apparently never questioned.

In *Mr. Hanger*, a patent infringement suit, the court specifically addressed the elements of good faith and reasonableness. In awarding costs to the defendant, it found that the defendant's Rule 68 offer constituted essentially the same relief requested in the complaint by the plaintiff.

The Petition attempts to magnify the need for this Court's review by presenting an elaborate recounting of the history of costs awards. (Pet. at 12-18). Petitioner acknowledges, however, that litigation involving the particular issues raised herein has been rare. (Pet. at 12). In the more than forty one years since the enactment of Rule 68 (App. G, A 15), only six federal cases have interpreted its provisions (Pet. at 13, n. 6). By Petitioner's admission, *Dual*, *supra*, and *Mr. Hanger*, *supra*, are the only federal decisions in which the issue of "mandatory versus discretionary application" of the Rule has been directly addressed. (Pet. at 12). Viewing Rule 68 in this context, it must be concluded that the Rule is unlikely to generate repeated litigation in the federal courts.

In light of the current state of federal case law with respect to Rule 68, and because, as will be shown below, the Court of Appeals correctly decided the issues before it, this Court should deny the petition for certiorari.

A. "REASONABLENESS" AND "GOOD FAITH" ARE IMPLICIT REQUIREMENTS OF RULE 68.

It is the undisputed and sole purpose of Rule 68 to encourage settlement in order to expedite litigation. *Stafford v. Lake Central Airlines, Inc.*, 47 F.R.D. 218 (N.D. Ohio

1969).^{*} By placing the risk of cost liability on an offeree, Rule 68 discourages the offeree from rejecting an offer unless the possibility is strong that the judgment obtained will exceed the offer.

A defending party, however, bears no similar risk under Rule 68. Consequently, as the Court of Appeals noted in this case, given the automatic application of Rule 68 which the petition urges, an offeree might routinely tender token offers in bad faith as a means of procuring "cheap insurance against costs." (App. B, A 5). Clearly, this practice would afford neither party any incentive to settle, the result being the protraction of litigation which Rule 68 seeks to avoid.

Because the intended purpose of Rule 68 will be served only by an offer made in genuine contemplation of settlement, the concepts of reasonableness and good faith are implicit in its terms and fundamental to its application. Assuming a finding that a claim is not wholly lacking in merit, Rule 68 is not to be applied automatically. Before an offer is permitted to trigger the cost-shifting provisions of Rule 68, the trial court must determine that the offer has been made in a good faith attempt to meet a plaintiff's reasonable expectations. Although Petitioner charges the Seventh Circuit with the "emasculat[i]on" of Rule 68 (Pet. at 67), in reality it would be a rigid and overly technical construction and not the Court of Appeals' prudent application of the Rule which would render it powerless to accomplish its purpose.

Petitioner's allegation that the Court of Appeals' application of Rule 68 "effectively duplicates" Rule 54(d) (Pet. at 15-18), is equally unfounded. Inquiry into the reasonableness and good faith of an offer ultimately affects

only those who would take unfair advantage of the Rule. Rule 68 continues to operate as incentive and encouragement to resolve litigation when there is a *bona fide* attempt to settle a lawsuit.

B. THE COURT OF APPEALS' INTERPRETATION OF RULE 68 IS CONSISTENT WITH THE OBJECTIVES OF TITLE VII.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* was enacted by Congress to encourage individuals to seek redress for violations of their civil rights. In furtherance of this goal Title VII specifically authorizes the award of attorneys fees and costs.

Recognizing "the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII," this Court has provided special protection for Title VII plaintiffs by limiting the award of attorneys' fees to the prevailing defendant to cases where the claim is found to be unreasonable, frivolous, vexatious or meritless. *Christianburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 422 (1978). The Court of Appeals in the present case, citing *Christianburg*, similarly recognized the intent of Congress to facilitate the vindication of an aggrieved party's civil rights. Accordingly, it properly refused "to permit a technical interpretation of [Rule 68] to chill the pursuit of that high objective." (App. B, A 6).

^{*} See also *Fed. R. Civ. P.* 68, Advisory Committee Note on 1946 Amendment, 28 U.S.C.A. (West 1970) and 7 Moore's Federal Practice ¶6802 (2d ed. 1972).

CONCLUSION

The Congressional intent embodied in both Title VII and Rule 68 itself dictates the result reached twice in this case. Through the exercise of sound judicial discretion the Court of Appeals and the District Court avoided a result clearly never envisioned by Congress in enacting Title VII or the drafters of Rule 68. These courts have committed no error. Petitioner has presented nothing to this Court which conforms to the guidelines of Rule 19 or otherwise merits review. For these reasons, the petition should be denied.

Respectfully submitted,

SUSAN MARGARET VANCE
The Law Offices of
GLAZER AND VANCE
Suite 1125
179 West Washington St.
Chicago, Illinois 60602

CAROLE KAMIN BELLOWES
11 South LaSalle St.
Suite 2001
Chicago, Illinois 60603
Attorneys for Respondent

On the Brief
DORENE MARCUS
77 West Washington St.
Room 1615
Chicago, Illinois 60602